INDIA - MEASURES AFFECTING THE AUTOMOTIVE SECTOR
(WT/DS146-175)

Response of the United States to Additional Questions from the Panel (Second Substantive Meeting)
July 5, 2001

Questions to the United States:

The Matter Before the Panel

Question 72

You have indicated that there is in your view no distinction to be drawn between the measures as they existed at the time of Panel establishment and now (answer to question 2(a), para 3). In your second oral statement, you presented alternative arguments relating to the possibility of accrual of further export obligations for current imports (para. 26) and relating to possible recourse to monetary penalties under Section 11 of the FT(DR) Act after April 1, 2001, concluding that "for this reason as well, the export balancing requirement thus continues to impose an import restriction even after April 1, 2001, and is inconsistent with GATT Article XI:1" (para. 28, emphasis added). Could you please clarify, in light of that statement, whether you are requesting the panel to make a specific finding to the effect that the measures at issue have remained inconsistent after 1 April 2001? In answering this question, could you please indicate

(a) what is the relevance of arguments relating to the post-1 April 2001 situation in the assessment of the elements of violation in the various provisions alleged to have been violated as at the date of establishment of the Panel?

(b) how an analysis of the post-April 2001 situation would fall within the terms of reference?

(c) by what process the panel would be expected to make a finding that the measures have remained inconsistent after 1 April 2001? Is the Panel to revisit each element of the relevant WTO provisions as they apply to the facts after that date? If so, on what basis is the Panel entitled to do so?

Answer 72

1. The United States is not requesting the Panel to make a separate finding to the effect that the measures at issue have remained inconsistent with India's WTO obligations after April 1,

2001. In GATT and WTO practice, panel decisions have been based on an examination of the measures as they existed on the date of the panel's establishment. In this case also, the U.S. panel request described the measures as in existence on the date of establishment; those are the measures upon which the United States and India consulted; and those are the measures that (pursuant to DSU Article 7) are within the Panel's terms of reference.[1] It is India, not the United States, that has sought to make the date of April 1, 2001, relevant to the legal issues in this dispute by contending that the elimination of import licensing on April 1, 2001, constitutes in some sense a defense to the U.S. claims.

2. The United States has made two responses to this Indian contention. First, and most importantly, we have explained that India has confused the issue: This dispute involves the indigenisation and trade balancing requirements as such, and the import licensing regime is distinct from those two requirements. India does not contend that those two requirements came to an end on April 1st; to the contrary, India has repeatedly confirmed that they continue to remain in force. For that reason, arguments about the post-April 1 situation would not be relevant to the Panel's analysis of the United States' legal claims, even if those claims were based on the measures as they existed on some date other than the date of panel establishment.

3. It may be useful to elaborate this analysis further. India's argumentation essentially presents the question whether, for the contractual obligation at issue to remain a WTO-inconsistent "requirement" or "measure" for purposes of GATT Articles III:4 and XI:1, there need be an on-going *quid pro quo* from the government. The answer is no. A distinction must be drawn between the *requirements* themselves, and the *advantage* used to induce the private actors to accept the requirements.

4. As set forth in our first submission, the indigenisation and trade balancing requirements in the MOU's fall within the ordinary meaning of the term "requirement." They are legally binding, and the MOU signatories are required to comply with them. We went on, however, to address a further question that arose in the *FIRA* dispute, which is whether a requirement of this sort, that is, one found in a contract with the government, is the type of requirement that falls within the scope of GATT Article III:4. The *FIRA* panel concluded that it did, based in part on the fact that the private actors accepted these requirements in order to obtain an advantage from the government.[2]

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[1] Moreover, even if (contrary to the actual situation) the measures at issue in this case were no longer in existence, this Panel should follow previous GATT and WTO panel practice by completing its examination and issuing its findings with respect to the measures as they existed on the date of establishment. *See, e.g.,* the Report of the Panel in *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted as modified by the Appellate Body on other issues on 22 April 1998, para. 6.12; the Report of the Appellate Body in *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted on 23 May 1997, page 1; and the Panel Report on *Indonesia – Certain Measures affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 25 September 1997, para. 14.9.

[2] Panel Report in *Canada - Administration of the Foreign Investment Review Act ("FIRA")*, L/5504, adopted on 7 February 1984, BISD 30S/140, para. 5.4.

5. The nature, the timing, or the duration of the advantage is irrelevant. In *FIRA*, the advantage was permission by the government to invest in Canada. That investment was discrete in time: a one-time event. The panel report mentions no provision in the agreement between Canada and the companies that would have obligated a signatory to withdraw its investment under any circumstances. Nevertheless, the obligations undertaken by the companies were themselves on-going. This did not prevent them from being considered "requirements" for purposes of Article III:4; nor should it have. The requirements were legally binding, and remained so. The only significance of the presence of an "advantage" was to dispel whatever doubts there might have been about whether these contractual obligations were subject to Article III:4. The advantage was offered by the government to induce companies to accept requirements they would not otherwise have accepted.

6. In the case at hand, the "advantage" was permission to import SKD/CKD kits into India. It is irrelevant that after a certain date, the advantage effectively became a "right," that is, that permission to import was no longer required. The only significance of the advantage was that it served as an inducement for companies to sign the MOU's in the first place -- and thereby accept the indigenization and trade balancing requirements contained therein. The advantage could just as easily have been permission to import SKD/CKD kits for one day, or until such time as this permission became an unfettered right, or until April 1, 2001 -- and any contractual requirements accepted in return would have been subject to Article III:4, for as long as those requirements would be legally binding.[3]

7. Likewise, the GATT-consistency of the advantage itself was not at issue in *FIRA*. Canada's investment statute was not at issue in *FIRA*, and it did not breach any GATT 1947 rules. Nor would Canada's conditional permission to invest necessarily have been inconsistent with GATT 1947 rules -- had the conditions not involved trade in goods, they could not have been the subject of a dispute. Similarly, the question whether India's import licensing regime was itself WTO-inconsistent is irrelevant to this dispute. All that is significant is that manufacturers were given permission to do something they were otherwise prohibited from doing under Indian law, and that in return for this advantage, the companies accepted requirements that would remain in effect for the term of the MOU's.

8. Thus, neither the timing, nor the on-going existence, nor the WTO-consistency of the advantage are relevant to this Panel's analysis -- all that matters is that there was some government-provided advantage *at the time the MOU's were signed* which induced acceptance of the requirements that are being examined for consistency with Articles III:4 and XI:1. The advantage in this dispute was the right to import SKD and CKD kits while an import licensing

[3] *FIRA* is not the only GATT or WTO dispute to examine the question of whether certain types of actions not involving a formal regulatory or legislative action by a government might be examined by a panel. For example, in *Japan – Semiconductors* the Panel examined whether formally non-binding administrative guidance could be considered a measure for purposes of GATT Article XI. The panel concluded that such guidance could still be considered a "measure" if there were sufficient incentives or disincentives for the private party to comply and the operation of the measures was essentially dependent on Government action or intervention. Panel Report on *Japan - Trade in Semiconductors*, L/6309, adopted on 4 May 1988, BISD 35S/11, para. 109.

scheme was in place. The provision of this advantage dispelled any doubts that the indigenization and trade balancing obligations in place for the term of the MOU's are "requirements" and "measures" within the meaning of Articles III:4 and XI:1. As such, the requirements must be examined for their consistency with GATT 1994 Articles III:4 and XI:1 -- in their own right, and without regard to what has become of the import licensing regime.

9. Apart from the foregoing, we have also made a second response to the Indian argument: Even if (contrary to the points in paragraphs 2-8 above) arguments about the situation after April 1, 2001, were relevant to the U.S. claims in this dispute, the elimination of import licensing on that date would not constitute a defense to the U.S. claims. That is so because the elimination of import licensing did not eliminate the enforceability or binding nature of the indigenisation and trade balancing requirements. The elimination of import licensing may have removed one means by which the Indian authorities can enforce Public Notice No. 60 and the MOU's, but others remain: actions in Indian civil courts and actions under the FT(DR) Act. And, the fact that these other means of enforcement remain available confirms that the indigenisation and trade balancing requirements are and remain mandatory "requirements".

10. In response to parts (b) and (c) of the Panel's question, the indigenisation and trade balancing requirements as such are within the Panel's terms of reference. The Panel must of course consider the arguments that India has advanced about the relevance of the situation after April 1, 2001, since India has made those arguments a central part of its defense. However, by disposing of those arguments along the lines described in the previous paragraphs, the Panel will not be straying beyond its mandate; it will simply be rejecting India's attempt to give the date of April 1, 2001, a significance it does not have. Indeed, the Panel will simply be doing what every panel does: ruling on a measure several months after the panel's establishment. To do so is not inconsistent with the Panel's terms of reference.

Question 73

Could you please clarify:

(a) whether you are requesting the Panel to make a distinct ruling on PN 60 *per se*, separate from any MOU's executed thereunder?

(b) if so, what exactly is the role of Public Notice No 60 in your separate claim against the indigenization and balancing provisions contained in the MOU's concluded under Public Notice 60?

Answer 73

11. The United States is not requesting the Panel to make findings on Public Notice No. 60 that are separate from its findings on the MOU's executed thereunder. The United States is, however, requesting that the Panel's findings encompass both Public Notice No. 60 and the individual MOU's.

12. The U.S. claims in this dispute relate to the indigenisation requirement and the trade balancing requirement found in the measures specified in the U.S. request for establishment of the Panel.[4] Those measures include both Public Notice No. 60 and the MOU's concluded thereunder. The MOU's are directly binding on individual signatories because, according to India, they are contracts enforceable under Indian domestic law. However, the indigenisation and trade balancing requirements were originally established by Public Notice No. 60. In fact, the terms of the MOU's are mandated by Public Notice No. 60, paragraph 8 of which provides that "a standard format for MOU is enclosed as appendix to this Public Notice and *MOU is required to be signed as per this format.*"[5]

13. Consequently, a comprehensive ruling by the Panel would apply to both Public Notice No. 60 (the source of the WTO-inconsistent requirements) and the MOU's (by which individual companies are bound to those WTO-inconsistent requirements), especially since Public Notice No. 60 was, as all the parties this dispute agree, in force at the time this Panel was established. However, the Panel need not analyze Public Notice No. 60 separately from the MOU's in order to make its findings.

Question 74

India has indicated that the trade balancing and indigenization provisions are an "inherent part" of the import licensing scheme. Could you please comment on this assertion, and more particularly, on the following:

(a) what relevance can this notion have to claims under Articles III:4 and XI:1 of GATT 1994 and Article 2.1 of the TRIMS agreement and why?

(b) If relevant, by what test should the Panel determine whether the measures are an "inherent part" of the licensing scheme?

(c) what exactly the implications of this notion are in your view with regard to an examination of the trade balancing and indigenization provisions *per se* ?

(d) Is the Export –Import Policy 1997-2002 an "inherent part" of the discretionary licensing scheme considered in the *India – QRs* dispute? If not, why not?

Answer 74

14. With respect to part (a) of the Panel's question: As we understand India's argumentation, the notion of "inherence" has no relationship to the analysis of GATT Articles III and XI or the TRIMs Agreement *per se*. Instead, India has introduced the notion of "inherence" solely to

[4] *See* Response of the United States to Questions from the Panel (April 10, 2001), para. 1.
[5] Exhibit US-1.

support its argument that what it calls the principles of *res judicata* and "splitting" bar the United States' claims in this dispute; "inherence" has no relevance in this dispute other than as a premise for that particular Indian procedural defense to our complaint. In other words, the Panel need not consider at all whether indigenisation and trade balancing are "inherent" in its licensing regime in order to determine whether those requirements are consistent with India's substantive obligations under the GATT and the TRIMs Agreement.

15. With respect to parts (b) and (c) of the Panel's question: The United States has previously explained why the notions of *res judicata* and "splitting" do not apply in this case; why the indigenisation and trade balancing requirements in any event cannot be considered as "inherent" in India's import licensing regime; and why the Panel should not accept this Indian procedural defense.[6] For example, import licensing around the world can and generally does operate without such requirements. Furthermore, we pointed out that the indigenisation and trade balancing requirements were not eliminated when import licensing ended, but instead remain (as India concedes) enforceable. This fact alone demonstrates that these requirements are not "inherent" in India's licensing scheme.

16. India in fact operated its operating licensing system in a myriad of ways and with a large number of variations in detail. As India explained in response to a question from the Panel: "It would in any case have been totally impracticable for India to notify these details [*i.e.*, the details for its licensing regime] for 2,700 items and for the Committee on Balance-of-Payments Restriction to examine them."[7] The fact that those details vary from item to item makes clear that no one set of these variations is in any sense "inherent" in import licensing *per se*. Furthermore, India cannot have it both ways: It cannot both say that it would have been impractical for the indigenisation and trade balancing requirements to be notified to and examined by the Balance-of-Payments Committee, and yet also say that the *India-QR's* panel ruled on these details without either knowing about them or examining them.

17. For these reasons, as well as those elaborated in our Second Submission and at the Second Panel Meeting, the notion of "inherence" has no role to play in the Panel's examination of the trade balancing and indigenisation requirements *per se*.

18. With respect to part (d) of the Panel's question: The Exim Policy is not an "inherent part" of the discretionary import licensing system that the *India-QR's* panel considered. Rather, certain provisions of the Exim Policy (along with other Indian measures) described and formed the domestic legal basis for that discretionary licensing system.[8] However, the Exim Policy is the basic document of the Indian import and export regime and does not just describe the discretionary import licensing system as such that the *India-QR's* panel considered. To be sure,

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[6] *See, e.g.*, Second Submission of the United States, paras. 20-37.

[7] Answers to the Questions From the Panel to India (10 April 2001), answer to question 65.

[8] *See, e.g.*, First Submission of the United States, paras. 18-19 (describing the Exim Policy and India's ITC(HS) Classifications), para. 35 (describing the FT(DR) Act as the statutory authority for formulation and announcement of the Exim Policy), para. 83 n.76 (describing the Handbook of Procedures of India's Ministry of Commerce), and Exhibits US-4, US-6, US-15, and US-16.

one of the elements of the Indian import regime at the time of the *India-QR's* dispute was a system of discretionary import licenses allegedly maintained for balance-of-payments reasons, but there are many other elements as well. For instance, Chapter 5 of the Exim Policy includes policies on such matters as second-hand goods, imports of gifts, passenger baggage, and the re-import of goods repaired abroad.[9] It is not possible that all of the Indian import and export policies stated in the Exim Policy are "inherent" in just one of those policies.

Question 75

Is the Panel required under its terms of reference to examine the measures in their historical and legal context, to determine whether they are inconsistent with the provisions referred to in the claims? If not, why not? Alternatively, is the Panel being asked to rule on a hypothetical situation which would not take into account one or more of the elements of the factual situation at the time the Panel is considering the claims under its terms of reference?

Answer 75

19. The Panel is required to examine the measures in their factual context. The United States is not asking the Panel to rule on a hypothetical situation.

Question 76

Is it your view that a panel can have "settled" matters which is has not expressly ruled on? If so, how? The *India-QRs* Panel ruled on violations of Article XI:1 of the GATT 1994. Can it have "settled" any matters pertaining to violations of other provisions of the GATT and the TRIMs Agreement?

Answer 76

20. The United States has not been able to envision any situation in which a panel can have settled an issue on which it did not expressly make findings.[10] Under DSU Article 11, the function of a panel is to "make such other findings as will assist the DSB in making the

[9] A copy of chapters 1 through 5 of the Exim Policy as amended through 13 October 2000, as well as the table of contents describing all 15 chapters, was submitted to the Panel as Exhibit US-4. A copy of the complete Exim Policy, as amended through 31 March 2000, was deposited by India with the WTO Secretariat on 10 November 2000. *Agreement on Import Licensing Procedures: Notification under Articles 1.4(a) and 5 of the Agreement*, G/LIC/N/1/IND/3, G/LIC/N/2/IND/3, circulated 13 December 2000.

[10] We assume that in this question the word "matter" is used not in its technical meaning under DSU Article 7.1 but simply as a synonym for "issue". Otherwise, this question would appear never to arise, because by issuing findings and conclusions, every panel "rules" on the Article 7.1 "matter" presented to it.

recommendations or in giving the rulings provided for in the covered agreements."[11] The DSU does not give any legal status to findings that a panel does *not* make.

21. Furthermore, GATT and WTO dispute settlement panels are authorized to exercise judicial economy and not to make a finding on a particular legal issue if the finding is not necessary to enable the Dispute Settlement Body to make sufficiently precise recommendations and rulings to allow for prompt compliance in order to ensure the effective resolution of the dispute.[12] It is difficult to see how a finding that a panel chose not to make for reasons of judicial economy could settle the issue that would have been the subject of the finding if the panel had made it. It is equally difficult to see how a finding that a panel did not make *without* citing judicial economy could settle the issue that would have been the subject of the finding if the panel had made it.

22. For these reasons, as well as the reasons that we have previously set forth,[13] the findings of the *India-QR's* panel could not have settled any matters pertaining to violations of GATT Article III:4 or the TRIMs Agreement.

The MOU's

Question 77

Do you consider that the rights and obligations of the parties under the MOU's signed under PN No 60 are the same or different from rights and obligations under the MOU's signed prior to Public Notice No 60? To the extent that you consider them to be different, are the differences significant? Please give reasons, drawing attention, *inter alia*, to the following terms of the respective MOU's:

(a) clause III of the pre-1997 MOU refers to the signatory's "intention to do the following ..."; clause III of the 1997 MOU includes the phrase "the party shall do the following ..." ;

(b) clause III (iii) of the pre-1997 MOU indicates that "the party intends to achieve the following levels of indigenization ..."; clause III (iv) of the 1997 MOU indicates that "the party shall achieve" stipulated levels, namely 50% in the third year and 70% in the fifth year;

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[11] Under DSU Article 3.4, the recommendations or rulings referred to in Article 11 "shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements."

[12] *See, e.g.,* Report of the Appellate Body in *Australia - Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted on 6 November 1998, para. 223.

[13] *See, e.g.*, Second Submission of the United States, paras. 18-37.

(c) clause III (v) of the pre-1997 MOU indicates that " the party intends to achieve exports of its products ..."; clause III (vi) of the 1997 MOU indicates that "the party shall achieve a broad level of indigenization of foreign exchange over the entire period of the MOU ..." and " would have an export obligation ...". It also refers to "[t]he export commitment";

(d) clause V of the pre-1997 MOU as compared to clause V of the 1997 MOU.

Answer 77

23. The United States does not know what the legal consequences are, under Indian law, of the wording used in the pre-1997 MOU's. While it does appear, from the provisions to which the Panel has drawn attention, that the post-1997 MOU's are in some sense "more binding" than the pre-1997 MOU's, the United States is not in a position to say whether that is in fact the case.

24. Whether the pre-1997 MOU's impose the same obligations as the post-1997 MOU's or different obligation is not, however, significant to this dispute. In this dispute, the United States has challenged Public Notice No. 60 and the MOU's that were signed under that regulation. The fact that India had a similar policy in the past, or that its policy has persisted for a period of time, is not relevant to whether the present measures -- namely Public Notice No. 60 and the MOU's currently in force -- are consistent with India's WTO obligations. This point has been clear ever since the panel report on *Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, in which the panel:

> ... recognized that restrictions had been in existence for a long time without Article XXIII ever having been invoked by Hong Kong in regard to the products concerned, but concluded that this did not alter the obligations which contracting parties had accepted under GATT provisions. Furthermore the Panel considered it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties.[14]

25. The United States also notes that, according to India, the pre-1997 MOU's were not uniform.[15] The United States does not know whether other pre-1997 MOU's are similar to the ones that India has furnished to the Panel as its Exhibits 1 and 2.

Trade Balancing Provisions

[14] Panel report on *Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, L/5511, adopted on 12 July 1983, BISD 30S/129, para. 28.

[15] *See Replies by India to Questions Posed by Japan*, G/TRIMS/W/15, circulated 30 October 1998, answer to questions 6 and 28.

Question 78

What is the relevance to this dispute of the scope of the trade balancing requirement in relation to imports not subject to licensing? To the extent that it may be relevant, could you please indicate who, in your view, bears the burden of proof concerning the scope of the trade balancing provisions? What evidence would be sufficient to amount to a *prima facie* case in this matter?

Answer 78

26. The United States claims that Public Notice No. 60 and the MOU's require car manufacturers to balance the import of those SKD/CKD kits and components for which an import license was required. The United States does not claim that Public Notice No. 60 or the MOU's require manufacturers to balance the import of other goods that were not subject to import licensing. Therefore, the particular issue raised by this question is not relevant to the U.S. position in this dispute. Similarly, the question of which party has the burden to present a *prima facie* case on that subject does not arise.

27. There is, however, a related point that the United States wishes to mention for the sake of completeness. The United States has expressed concern about the meaning of the phrase "over the entire period" in paragraph III, clause (vi), of the MOU's. That phrase appears to require MOU signatories to continue to balance imports of SKD/CKD kits and components even if the import license requirement for those items comes to an end. We noted in our second submission that India had not yet explained the operation of that phrase. We see that the Panel has asked India a question equivalent to our question 79 and we look forward to India's response.

Question 79

Do you remain concerned that the trade balancing requirement may not apply only to kits and components subject to import licensing? If so, could you please provide:

(a) evidence of the methodology used for the purposes of establishing the value of exports to be made under the trade balancing provisions and of the data on which it is based (e.g. estimates in the MOU's, annual reports by the manufacturers...).

(b) examples of calculations performed in the past for such purposes ?

(c) information on whether the signatories' annual reports under clause IV of the MOU's make the distinction between imports subject to license and those not subject to license?

If you feel able to answer some elements of these questions on the basis of redacted versions of existing documents, you are encouraged to do so.

Answer 79

28. As explained in response to the previous question, the United States does not claim that export balancing obligations have accrued with respect to MOU signatories' imports of goods that never required an import license.

29. The United States does not have any information at this time on whether the Indian authorities have continued to accrue export obligations with respect to imports after April 1, 2001, of goods that used to require an import license. Because all such importations indisputably did attract export obligations until April 1, 2001, past calculations and annual reports would not furnish information about Indian practice since that date.

Question 80

What is the time-frame in which existing signatories will have to discharge remaining export balancing obligations accrued before 1 April 2001:

(a) in the case of those manufacturers that have reached the 70% indigenization level; and

(b) in the case of the manufacturer which has not yet reached that level of indigenization on one of its models?

Answer 80

30. It is not clear. The standard format MOU in Public Notice No. 60 does not contain a specific end date. On the other hand, the MOU's appear to contemplate a term of at least four years, because the export balancing requirement begins to impose import restrictions "from the fourth years onwards" (paragraph III, clause (vi)). India has furnished two sample MOU's to the Panel. One of these appears to contain no reference to an end date;[16] the other provides that it "will govern the activities of the [manufacturer] during the period from April 1, 1995 to March 31, 2002."[17]

31. The United States notes that the Panel has asked India the same question (number 113) and looks forward to India's response.

[16] Exhibit India-2.
[17] Exhibit India-4.

Claims under GATT 1994

Question 81

Article XI:1 of GATT refers to "prohibitions or restrictions other than duties, taxes or other charges, *whether made effective through* quotas, *import* or export *licenses* or other measures (...)" (emphasis added). What is the relevance of this reference in the context of the Panel's analysis of the claims under Article XI:1 at issue in this dispute?

Answer 81

32. Article XI:1 has a broad scope.[18] The words to which the Panel draws attention describe some but not all of the ways that a "prohibition" or "restriction" on importation can be carried out. The words "or other measures" make clear that the list is illustrative. Other kinds of measures that have been found inconsistent with Article XI in particular factual circumstances have included, for example, minimum import price systems[19] and non-binding administrative guidance.[20]

33. It would therefore be incorrect to conclude that the elimination of India's import licensing regime also eliminated the inconsistency of Public Notice No. 60 and the MOU's with GATT Article XI:1.

Question 82

In light of India's arguments concerning the respective scopes of application of Articles III and XI (footnote 8 of India's second submission and oral statement during the second meeting), could you please clarify whether and how, in your view, Articles III and XI:1 can be applicable simultaneously to the same measures, or to the same (or distinct) aspects of the same measures? Please elaborate further, in this light, on whether and if so, how the indigenization and trade balancing provisions can, in your view, be in violation of both Article III and Article XI?

Answer 82

34. GATT Article XI:1 applies to prohibitions or restrictions (other than duties, taxes or other

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[18] *See, e.g.*, First Submission of the United States, para. 89, and the panel reports cited there.

[19] Panel Report on *EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, L/4687, adopted on 18 October 1978, BISD 25S/68, para. 4.9.

[20] Panel Report on *Japan - Trade in Semiconductors*, L/6309, adopted on 4 May 1988, BISD 35S/11, para. 109.

charges) instituted or maintained on the *importation* of products. GATT Article III:4 applies to "laws, regulations and requirements affecting [products'] *internal* sale, offering for sale,

purchase, transportation, distribution or use". These two provisions address different issues, and the United States does not challenge the distinction between them.

35. It is possible, however, for a particular law, regulation, or other measure to have one aspect that restricts importation and another aspect that leads to less favorable treatment after importation. For example, a law that limits the total quantity of a good that may be imported and also restricts the sales outlets for that good would have aspects that are inconsistent with both Article XI:1 (the quantitative limit) and Article III:4 (the sales outlet restriction). The fact that both restrictions appeared in one legal instrument should not mean that only one of those two articles could be invoked.

36. The drafters of the TRIMs Agreement recognized that export balancing requirements can likewise have aspects that limit importation as well as aspects that disadvantage imported goods. Paragraph 1(b) of the Illustrative List provides that a measure requiring "that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports" is inconsistent with Article III:4. Paragraph 2(a) provides that a measure restricting "the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports" is inconsistent with Article XI:1.

37. In this case, India's export balancing requirement clearly limits car manufacturers' importation of SKD/CKD kits and components. There are obviously limitations on the amount of exports which a car manufacturer may be able or willing to make (*e.g.*, because of limitations in its production capacity or limitations on demand in its export market). Thus, by limiting the amount of a manufacturer's imports to that of its exports, this aspect of the trade balancing obligation restricts imports. At the same time, however, India's export balancing requirement also discriminates against those very imported SKD/CKD kits and components, because the costs of the export mandate (such as disruptions to distribution plans and commercial planning) do not apply to like domestic kits and components. Consequently, the more a car manufacturer uses imported SKD/CKD kits/components instead of like domestic kits/components, the more that manufacturer incurs (and its finished products must carry) those costs.

38. The situation therefore resembles that of paragraphs 1(b) and 2(a) of the TRIMs Agreement Illustrative List: the export balancing requirement appears to have a feature that restricts importations, and a feature that discriminates against the internal use of imported goods. The requirement may therefore be inconsistent with either GATT Article XI:1 or Article III:4. While there might be some question about which it violates, it in any case clearly must be

inconsistent with at least one of those provisions.[21]

39. However, the trade balancing obligation attaches not only to SKD/CKD kits that a manufacturer itself imports, but also to those imported SKD/CKD kits that the manufacturer purchases within India.[22] Whatever question there may be about the aspect of the obligation discussed in the previous two paragraphs, this resale-in-the-domestic-market aspect of the export balancing requirement is clearly inconsistent with GATT Article III:4 (but not Article XI:1). For example, a manufacturer seeking to meet its export obligation through the export of finished vehicles will purchase domestic components rather than imported kits -- because purchasing an imported kit would only further increase the manufacturer's export obligation, while purchasing the like domestic kit will not. Similarly, a manufacturer that needs to reduce an excess inventory of SKD/CKD kits or components will, all other things being equal, find a readier market for domestically produced kits than imported ones, because the imported ones carry with them the additional burden of the trade balancing requirement and the domestic ones do not.

40. Finally, the indigenisation requirement is essentially a straightforward local content requirement. As described in the United States' previous submission, it is inconsistent with GATT Article III:4 because manufacturers can meet their indigenisation obligation only by purchasing and using Indian parts and components (instead of imported ones) in their production of motor vehicles.[23] There are no GATT Article XI issues that relate to this aspect of the indigenisation requirement.

41. At the same time, however, India has yet to explain its own description of a separate aspect of the indigenisation provision in the MOU's. India has said that the MOU's *as such* are intended to limit the importation of SKD/CKD kits/components when a firm fails to meet the indigenisation requirement in paragraph III, clause (iv) of the MOU: "As all the companies have achieved the desired level of indigenisation during the last two years (since issuance of Public Notice No. 60) the need *to invoke MOU's to impose limitation on them* has not arisen."[24] To the extent that the MOU's *as such* prevent signatories from importing SKD/CKD kits if the signatories do not meet the indigenisation targets, the MOU's contain a separate aspect that is also inconsistent with GATT Article XI:1.

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[21] As the United States has noted before, the panel in *Animal Feed Proteins* concluded that a measure like that at issue here was inconsistent with GATT Article III:4. *See* First Submission of the United States, para. 85; Second Submission of the United States, para. 47. At the same time, the measure here appears to fall squarely within the scope of paragraph 2(a) of the illustrative list.

[22] India has reconfirmed this point in its answer to the Panel's question 47(b).

[23] *See, e.g.,* First Submission of the United States, paras. 60-81, and Second Submission of the United States, paras. 40-42.

[24] India's Answers to Questions by the United States, 13 July 2000, answer to question 5, Exhibit US-11 (underlining in original, other emphasis added).

TRIMS Agreement

Question 83

Paragraph 1 of the Illustrative List of the TRIMS Agreement refers to "TRIMS ... which are mandatory or *enforceable*". In your view, if a Member has not yet decided to enforce an enforceable obligation, does this in and of itself prevent the measure from falling within the terms of the illustrative list? If so, why?

Answer 83

42. No, the terms "mandatory and enforceable" -- as opposed to "enforced" -- make clear that such measures fall within the Illustrative List regardless of whether a Member is actually enforcing the measure.[25]

43. This interpretation accords with the conclusions reached by the *FIRA* panel. In that case, many of the local content undertakings were not being enforced by the Canadian Government; indeed, according to the panel report the undertakings were typically waived.[26] The panel nonetheless concluded that the undertakings were inconsistent with GATT Article III:4.

44. Indeed, any other conclusion would lead to perverse results. For instance, car manufacturers would be placed in the untenable position of having to risk enforcement proceedings in order for a challenge to be brought. Furthermore, a country whose exports of automotive parts were being harmed by these requirements could not challenge the requirements if manufacturers were complying with them out of fear of enforcement (and therefore the Indian authorities did not need actually to "enforce" them). As the *FIRA* panel noted, "private contractual obligations entered into by investors should not adversely affect the rights which contracting parties, including contracting parties not involved in the dispute, possess under Article III:4 of the General Agreement and which they can exercise on behalf of their exporters."[27]

Order of examination of the claims and judicial economy

Question 84

In your view, what exercise of judicial economy is possible in this case if the Panel were to examine (a) the TRIMS claim after the GATT claims or (b) the

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[25] *See, e.g., The New Shorter Oxford English Dictionary* (3d edition, 1993), which defines "mandatory" as meaning "of the nature of, pertaining to, or conveying a command or mandate; obligatory in consequence of a command; compulsory", and defines "enforceable" as meaning "able to be enforced".

[26] *FIRA*, para. 2.11.

[27] *FIRA*, para. 5.6.

GATT claims after the claims on the TRIMs Agreement? More specifically, because Article 2.1 of the TRIMs Agreement deals with the same GATT

Articles as are referred to in the balance of this claim, would it be false judicial economy to rule on the GATT Articles or the TRIMs Agreement but not both? Does the notion of false judicial economy encompass notions other than addressing all the claims as necessary to secure a positive solution to the dispute? Are these factors relevant to this dispute?

Answer 84

45. If the Panel chose to examine the GATT claims but not the TRIMs Agreement claims, the Panel would not need to decide whether the measures at issue in this dispute are "trade-related investment measures" -- an issue on which the parties disagree. In the circumstances of this case, it would not be a "false judicial economy" to take that approach. A solution to this dispute will require elimination of both the restrictions on imports and the discrimination against imported goods that the indigenisation and trade balancing requirements impose. However, rulings under the claims made in this dispute under GATT Articles III:4 and XI:1 -- if properly implemented by India -- would lead to that solution.

Question 85

Would it be false judicial economy to examine either Article III or Article XI of the GATT in this case but not both? If so, why?

Answer 85

46. Yes, it would be a false judicial economy to examine either Article III or Article XI but not both. They relate to different aspects of the measures at issue in this case. As described in paragraph 34 above, the Article III claim addresses discrimination imposed on the *internal* sale, use, purchase, etc. of imported goods (in this case, imported SKD/CKD kits and components), while the Article XI claim addresses restrictions on the *importation* of goods. Furthermore, the product coverage of the claims is partially different: the indigenisation requirement violates Article III:4 by discriminating against imported automotive parts and components of *any* kind (not just SKD/CKD kits/components),[28] while the trade balancing requirement violates Article XI:1 by restricting the importation of SKD/CKD kits and components only.[29]

Question 86

In your view, which claims should the Panel examine first? Does the Panel have a discretion in this matter? If not, why not?

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[28] *See, e.g.*, First Submission of the United States, paras. 4 and 81.

[29] *See, e.g.*, First Submission of the United States, para. 84.

Answer 86

47. Previous panels have taken different approaches. The panel in the *Indonesia-Autos* dispute made findings under the TRIMs Agreement but not under the GATT 1994 (except insofar as analysis under the GATT was required for the TRIMs Agreement analysis); the panel that considered the *EC-Bananas* dispute took the reverse approach.[30] For the reasons given in paragraph 45, the United States believes this Panel could take up the GATT claims first.

48. If this Panel chooses to follow the course of examining only some of the claims, the Panel will of course be required not to do so in a manner that constitutes a false judicial economy (the U.S. views of which have been set out in the two previous answers).

[30] Panel Report on *Indonesia – Certain Measures affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 25 September 1997, para. 14.93 (explicitly invoking the principle of judicial economy); *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted 25 September 1997, paras. 7.186-7.187 (finding that "steps taken to bring EC licensing procedures into conformity with Article III:4 would also eliminate the alleged non-conformity with obligations under the TRIMs Agreement").